UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Paul Viko, Plaintiff,	:	
v.	:	No. 2:08-cv-221
World Vision, Inc. and World Vision International, Defendants.	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
(Docs. 5 & 26)

Presently before the Court is Defendants' joint motion to dismiss. The Defendants move to dismiss under Rule 12(b)(2) for lack of personal jurisdiction, under 12(b)(3) for improper venue, and under the common law doctrine of *forum non conveniens*. Fed. R. Civ. P. 12(b)(2); 12(b)(3). (Doc. 5). In the alternative, both Defendants move to transfer this matter pursuant to 28 U.S.C. § 1404(a) or § 1406(a). (Doc. 26).[1] For the reasons stated below, I recommend that the Defendants' motion to dismiss be DENIED, but that their motion to transfer this matter to the Central District

[1] Initially, the Defendants also moved to dismiss under Rules 12(b)(4) and 12(b)(5) for insufficient process and insufficient service of process respectively. (Doc. 5 at 1). In response, Plaintiff Viko cross-moved to correct service. (Doc. 10). In a separate Order, the Court denied Viko's motion as moot (Doc. 21), and now recommends that Defendants' 12(b)(4) and 12(b)(5) motions be denied as moot as well.

of California be GRANTED.

Background

For purposes of the motion to dismiss, all facts taken from Viko's pleadings are assumed to be true and all inferences are drawn in Viko's favor. Plaintiff Paul Viko is a retired Vermont resident who conducts international development work abroad. (Doc. 9 at 1). Defendants World Vision, Inc. and World Vision International are two elements of the "World Vision Partnership," a non-profit humanitarian organization that provides relief and development assistance in approximately 90 countries.[2] (Doc. 9 at 2; Doc. 5 at 1). World Vision, Inc. (WV, Inc.) is a California corporation with its principal place of business in Federal Way, Washington, and World Vision International (WV Int'l) is incorporated in California with its principal place of business in Monrovia, California. (Doc. 5 at 1).

In March 2006 Viko traveled to the African nation of Mozambique where he had been hired by International Executive Service Corps ("IESC") to give seminars on

[2] Hereinafter, this opinion shall refer to WV, Inc. and WV Int'l collectively as "World Vision."

business planning. IESC arranged for World Vision to host his seminars and to manage the logistics of his assignment, including transportation. (Doc. 9-2 at 1).

On March 25, 2006 Viko was a passenger in a motor vehicle operated by WV Int'l employee Carlitos Impada when Impada lost control of the vehicle and an accident occurred. The accident fractured Viko's spine in two locations. Viko was initially transported from Mozambique to Johannesburg, South Africa for medical care, and later received further treatment in Richmond, Virginia before being able to return to Vermont approximately five months after the accident. (Doc. 9 at 1-2).

On October 16, 2008 Viko filed the instant action, alleging that both WV, Inc. and WV Int'l are liable on the basis of *respondeat superior* as well directly liable for the negligent hiring and training of Mr. Impada.

Discussion

I. Personal Jurisdiction

A. Legal Standard

On a 12(b)(2) motion to dismiss the plaintiff

bears the burden of demonstrating contacts with the forum state that are sufficient to give the court jurisdiction over the person of the defendant. Country Home Products, Inc. v. Schiller-Pfeiffer, Inc., 350 F. Supp. 2d 561, 566-67 (D. Vt. 2004). However, prior to discovery or an evidentiary hearing on the issue, the plaintiff need only make a *prima facie* showing that jurisdiction exists, and this "remains true notwithstanding a controverting presentation by the moving party." Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985); see also Real Good Toys, Inc. v. XL Machine Ltd., 163 F. Supp. 2d 421, 423 (D. Vt. 2001). Finally, "in the absence of an evidentiary hearing on the jurisdictional allegations, or a trial on the merits, all pleadings and affidavits are construed in the light most favorable to the plaintiff," and all inferences are drawn in the plaintiff's favor. Hoffritz, 763 F.2d at 57.

Personal jurisdiction analysis consists of a two-part inquiry. First, the district court must determine whether the law of the state in which it sits would permit personal jurisdiction over the defendant.

Bensusan Rest. Corp. v. King, 126 F. 3d 25, 27 (2d Cir. 1997); Country Home Products, 350 F. Supp. 2d at 567. Second, the court must determine whether the due process requirements of the Fourteenth Amendment preclude the exercise of personal jurisdiction over the defendant. Country Home Products, 350 F. Supp. 2d at 567; see also International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945). In Vermont, however, courts have interpreted the relevant statute, 12 V.S.A. § 913(b), to permit personal jurisdiction over a defendant to the "outer limits of the due process clause." Sollinger v. Nasco Int'l, Inc., 655 F. Supp. 1385, 1387 (D. Vt. 1987) (citations omitted).[3] Thus the two inquiries merge, and the only question to be asked here is whether the exercise of personal jurisdiction over the defendant comports with the requisites of due process.

In order for a court's assertion of personal jurisdiction to comply with due process it must conduct

[3] Vt. Stat. Ann. tit. 12 § 913(b) states that: "Upon the service, *and if it appears that the contact with the state by the party or the activity in the state by the party or the contact or activity imputable to him is sufficient to support a personal judgment against him*, the same proceedings may be had for a personal judgment against him as if the process or pleading had been served on him in the state." (Emphasis added).

both a "minimum contacts" inquiry and a "reasonableness" inquiry. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996). To determine whether a defendant has made the "minimum contacts" with the forum state necessary for personal jurisdiction to attach, courts must first distinguish between "specific" and "general" jurisdiction. Id. at 567. "Specific jurisdiction exists when 'a state exercises personal jurisdiction over a defendant in a suit arising out of or relating to the defendant's contacts with the forum,'" while general jurisdiction "is based on the defendant's general business contacts and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts." Id. at 567-68 (quoting Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414-416, nn.8-9 (1984)). Courts impose a "more stringent" minimum contacts test for general jurisdiction, requiring the plaintiff to show that the "defendants' general business contacts with Vermont were continuous, systematic and of a sufficiently substantial nature as to permit a Vermont

court to entertain a cause of action." Bechard v. Constanzo, 810 F. Supp. 579, 583 (D. Vt. 1992); see also Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446 (1952) (explaining that a court may assert general jurisdiction over a foreign defendant only when the "continuous corporate operations within a state [are] thought so substantial and of such nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."). To be sufficient, these contacts must be the result of intentional and affirmative action by the defendant itself. Id. at 585; Pasquale v. Genovese, 136 Vt. 417, 421 (1978).

Once the requisite minimum contacts are established, the reasonableness inquiry requires the court to determine that an assertion of personal jurisdiction does not offend "'traditional notions of fair play and substantial justice.'" Tom and Sally's Handmade Chocolates, Inc., 977 F. Supp. 297, 300 (D. Vt. 1997); Metropolitan Life, 84 F.3d at 568. To make this finding courts looks at "1) the burden on the defendant; 2) the forum State's interest in

adjudicating the dispute; 3) the plaintiff's interest in obtaining convenient and effective relief; 4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and 5) shared interest of the several States in furthering fundamental substantive social policies." Country Home Products, 350 F. Supp. at 568 (citing Burger King v. Rudzewicz, 471 U.S. 462, 477 (1985)).

B. Personal Jurisdiction Over World Vision

As an initial matter, it is plain that this suit does not permit a finding of specific jurisdiction over World Vision, and Viko apparently does not dispute this assertion. (Doc. 9 at 6). This case arises out of alleged facts that took place in Mozambique and are thus completely unrelated to any contacts World Vision may have with Vermont.

Instead, Viko puts forth two arguments to show that both World Vision entities are subject to the general in personam jurisdiction of this Court. First, Viko contends that WV, Inc. consented to the general jurisdiction of Vermont's courts by registering to do business here and appointing a registered agent to

accept service of process. (Doc. 22 at 1-5). Since consent to jurisdiction can itself satisfy due process, Viko argues, WV, Inc.'s Vermont contacts are completely irrelevant. Id. And although he does not mention it, Viko must believe that this consent is imputable to WV Int'l, since WV Int'l does not have a registered agent of its own in Vermont.[4]

Second, Viko contends that World Vision maintains the necessary Vermont contacts to permit jurisdiction. His argument proceeds as follows: (1) WV, Inc. maintains continuous and systematic contacts with Vermont, (2) WV, Inc. is a dependent affiliate of WV Int'l and, (3) therefore, due process permits its contacts with Vermont to be imputed to WV Int'l to establish personal jurisdiction. In other words, Viko does not dispute that WV Int'l, at least to the extent that it is separate from WV, Inc., lacks "continuous" and "systematic" business contacts of its own, but instead argues that WV, Inc.'s relationship with WV

[4] In reality, World Vision International–not "Inc."–is likely to be the only defendant of any importance. Although Viko maintains that WV, Inc. may ultimately bear some or all of the liability in this case, World Vision has averred that only WV Int'l was responsible for the hiring, training, and employment of Mr. Impada. (Christine Naylor Aff. ¶ 20); (Doc. 9 at 22).

Int'l is such that its contacts also establish personal jurisdiction over WV Int'l. (Doc. 9 at 9).

In response, World Vision attacks both premises of Viko's "minimum contacts" argument.[5] It argues that WV, Inc. does not have substantial contacts with Vermont and, in any case, WV, Inc.'s Vermont contacts are irrelevant because WV, Inc. "is a separate legal entity from, and independent of, World Vision International," (Naylor Aff. ¶ 15) and therefore cannot serve as the basis for establishing personal jurisdiction over WV Int'l.[6] World Vision also denies that WV, Inc. has consented to personal jurisdiction in Vermont. (Doc.

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[5] It is worth noting that World Vision's presentation of its position on this motion has been less than transparent. In its initial motion to dismiss World Vision argued *only* that WV, Inc.'s Vermont contacts could not be imputed to WV Int'l, since WV Int'l is a separate legal entity with no Vermont contacts of its own. It provided no argument for the proposition that WV, Inc. itself was not subject to personal jurisdiction in Vermont. In fact, World Vision appeared to explicitly exclude WV, Inc. from both its 12(b)(2) and 12(b)(3) motions, while including it only in its motions for transfer. (Doc. 5 at 1). Only in its Reply to Plaintiff's Opposition did World Vision finally argue that *neither* WV, Inc. nor WV Int'l is subject to this Court's jurisdiction. Thus, World Vision created the bizarre possibility that WV Int'l could be dismissed for lack of personal jurisdiction because WV, Inc.'s Vermont contacts are insufficient, while WV, Inc. remains in Vermont court, at least in theory, because it never moved to dismiss in the first place. Importantly, any prejudice caused to Viko by this approach is minimized because the Court permitted supplemental filings and, in any case, Viko bore the burden of demonstrating jurisdiction from the outset. (Docs. 22 & 24).

[6] That is not to say that the two companies are entirely unrelated, for the Defendants also state–with some ambiguity–that WV, Inc.'s "coordination" with WV Int'l is "subject to a mutual consent to operate according to a common set of principles and a statement of faith." (Naylor Aff. ¶ 18).

24 at 2-5).

i. Personal Jurisdiction Over World Vision, Inc.

Since personal jurisdiction over WV Int'l is entirely dependent on whether this Court has general jurisdiction over WV, Inc., the Court begins with an analysis of (1) whether WV, Inc. has consented to jurisdiction, and (2) whether WV, Inc. has sufficient Vermont contacts to satisfy due process.

a. Did World Vision, Inc. Consent to General Jurisdiction in Vermont?

Viko argues that WV, Inc. consented to in personam jurisdiction in Vermont's courts for all causes of action, including those completely unrelated to Vermont, by registering to do business and appointing a registered agent in Vermont. (Doc. 22). Viko contends further that since individual defendants are free to waive objection or consent to personal jurisdiction, the Court need not determine whether World Vision maintains the necessary "minimum contacts" with Vermont to satisfy due process. Id.

The first step in evaluating Viko's claim must be to state the issue before the Court precisely. The

question is not whether, as some general matter, registering to do business in a forum by a foreign corporation amounts to jurisdictional consent. Rather, the initial inquiry is whether, *as a matter of Vermont law*, WV, Inc.'s compliance with Vermont's foreign corporation registration statute means that it has expressly consented to personal jurisdiction in Vermont, even when an assertion of jurisdiction would be otherwise impermissible.

After all, the extent of Vermont's reach over non-resident defendants is controlled by its legislature, with only constitutional ceilings, and not floors, by which to abide. See, e.g., Avery v. Bender, 204 A.2d 314, 316-317 (Vt. 1964); Pulson v. American Rolling Mill Co.,170 F.2d 193, 194 (1st Cir.1948) ("There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter for the law of the state as made by its legislature."). This approach is also consistent with the rule that the "amenability of a foreign corporation to suit in a federal court in a diversity action is determined in

accordance with the law of the state where the court sits, with federal law entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee." Metropolitan Life, 84 F.3d at 567 (internal quotation marks omitted); see also Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 711-712 (1982) (Brennan, J., concurring).

Thus, decisions by courts faced with this issue in other jurisdictions–including the Supreme Court–are not binding, though they may be persuasive to the extent they interpret and apply relevantly similar statutes.

Finally, understanding the initial state law inquiry makes clear that only after a finding that WV, Inc. has in fact provided its express consent to be sued in Vermont must the Court consider whether asserting jurisdiction on that basis alone would be constitutionally permissible. Metropolitan Life, 84 F.3d at 567.

Given the nature of the question, then, it is puzzling that Viko fails to put forth a statutory construction argument, or, for that matter, even

mention the Vermont registration statute at all. (Doc. 22). Instead, he discusses a completely inapposite Vermont Supreme Court decision,[7] and urges the Court to follow the precedent of the Second Circuit and New York, though he cites not a single Second Circuit case in his favor. (Doc. 22 at 4).

Vermont, like every other state and the District of Columbia, requires corporations organized and incorporated elsewhere to register to do business. See 11B V.S.A. § 15.01. These laws are generally referred to as "qualification" or "registration" statutes. In order to register in Vermont, a foreign corporation must submit an application which indicates, among other things, "the address of its registered office in this state and the name of its registered agent at that office." 11B V.S.A. § 15.03(a)(5). The corporation must also "continuously maintain...a registered agent" to remain registered. 11B V.S.A. § 15.07(2).[8]

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[7] See the Court's discussion of Burrington v. Ashland Oil Co., Inc., 356 A.2d 506 (Vt. 1976), infra.

[8] World Vision cites 11 V.S.A. § 1630 as the relevant appointment statute, and urges the Court to reject the notion of consent via registration because § 1630 limits service upon the registered agent to "action[s] founded upon liability incurred in this state." (Doc. 24 at 4). However, § 1630 applies only to nonresidents doing business in Vermont in their "individual capacity" or under an assumed name. See 16 V.S.A. § 1630. Such is not the case here, and the applicable statutory

These provisions say nothing at all about jurisdiction, let alone that by complying one expressly consents to personal jurisdiction for all matters, even those wholly unrelated to Vermont. In fact, 11B V.S.A. § 15.10(a) restricts service upon a foreign corporation's registered agent to service of process that is "required or permitted by law to be served on the foreign corporation." Far from supporting the proposition that appointing an agent effectually waives all other legal protections from amenability to judgment, this qualification suggests that the due process minimum contacts requirement is essentially built into the statute, at least when the assertion of general jurisdiction is at stake.[9] See, e.g., In re Mid-Atlantic Toyota Antitrust Litig., 525 F. Supp. 1265, 1278 (D.C. Md. 1981).

Even without this restriction, though, and

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provisions are those requiring non-profit foreign corporations to register in Vermont. See 11B V.S.A. § 15.01-15.10.

[9] The language of 11B V.S.A. § 15.10 is more restrictive than that of some other statutes pursuant to which consent to general jurisdiction was found. See, e.g., Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 -1200 (8th Cir. 1990) (applying a Minnesota state statute that said only that, "[a] foreign corporation shall be subject to service of process . . . [b]y service on its registered agent[.]"); New York Business Corporation Law § 304: "The secretary of state shall be the agent of . . . every authorized foreign corporation upon whom process against the corporation may be served."

assuming that service upon a foreign corporation's registered agent is effective for all causes of action, there remains an important distinction between mere service of process on the one hand, and actual amenability to judgment–that is, personal jurisdiction–on the other. While effective service demonstrates constitutionally sufficient notice, it does not, by itself, establish jurisdiction over the defendant's person. See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("Due process requires that the defendant be given adequate notice of the suit...and be subject to the personal jurisdiction of the court.") (internal citations omitted); Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987); Fed. R. Civ. P. 4(d)(5) ("Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.").[10]

[10] The Court of Chancery of New Jersey explained this distinction well in 1905, saying that the effect of its registration statute "was not to enlarge the jurisdiction of the court, but to provide a method for enforcing its jurisdiction. When the artificial being came within the state and transacted business, it brought itself within the jurisdiction of the courts of the state; but, until a method was provided for bringing the foreign corporation before the court, the jurisdiction of the court could not be enforced. When such method was provided, it did not serve to give the court any jurisdiction that it did not have before, but merely enabled it to enforce that which it had." Groel v. United Electric Co., 60 A. 822, 828 (N.J. Ch. 1905).

It is informative, then, that while § 15.03 requires the appointment of an agent, and § 15.10 permits service of process upon that agent, none of the relevant provisions explicitly require consent to jurisdiction.

Additionally, there are no prior decisions applying Vermont law to support Viko's argument. Viko relies primarily on Burrington v. Ashland Oil Co., Inc., 356 A.2d 506 (Vt. 1976), a Vermont Supreme Court decision in which the court found jurisdiction to adjudicate a case in which the defendant was a foreign corporation and the alleged tort occurred outside of Vermont. Viko believes this case to be persuasive because the defendant was registered to do business in Vermont, and the court established jurisdiction without entering into any further due process analysis. (Doc. 22 at 1-2). In Burrington, however, the only jurisdictional question was whether a Vermont state court possessed jurisdiction over the *subject matter*, not the defendant. The court described the defendant's objection "that the accrual of the cause of action in Maine and the non-residency of the parties deprive the

Vermont courts of jurisdiction over the *subject matter*," Burrington, 356 A.2d at 509 (emphasis added), and then framed the issue presented as whether "the lower court [has] jurisdiction over a *cause of action* arising outside of Vermont, where both the plaintiff-administrator and defendant corporation are non-residents of Vermont and the defendant is registered to do business in Vermont[.]" Id. (emphasis added).[11] Beyond the issue of jurisdiction, the court only considered whether Vermont was a sufficiently convenient forum under the doctrine of *forum non conveniens*. Id. at 509-510. Thus, Burrington is not relevant to the present inquiry.

Further, in Metropolitan Life, 84 F.3d 560 (2d Cir. 1996) the Second Circuit found personal jurisdiction lacking when a defendant registered to do business in Vermont was sued in Vermont.[12] The court

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[11] Burrington is also distinguishable because "a most compelling factor" in its holding was the fact that a state court without jurisdiction must dismiss the matter outright, while a federal court, such as this one, is statutorily authorized to transfer the case within the federal system. Burrington, 356 A.2d at 509; see also 28 U.S.C. § 1406(a).

[12] Viko characterizes Metropolitan Life as upholding general jurisdiction, but that is a misreading of the case. (Doc. 22 at 3, n.1). In fact, the Circuit found that "the exercise of jurisdiction...would violate traditional notions of fair play and substantial justice," and affirmed the District Court's order dismissing the case for lack of personal jurisdiction. Metropolitan Life, 84 F.3d

proceeded directly to a minimum contacts analysis, and ultimately found that Vermont's exercise of in personam jurisdiction over the defendant would have been "unreasonable." Id. at 576. Viko argues that this case is insignificant because "[w]hile the defendant . . . had registered to do business in Vermont, it apparently had not appointed a service agent[.]" (Doc. 22 at 3, n.1). But Viko fails to deduce that, just as it is under current Vermont law, the defendant in Metropolitan Life could not have registered to do business if it had not also appointed an agent to receive process. See 11 V.S.A. § 2105 (1990).[13]

To be sure, Metropolitan Life does not specifically address the issue of whether registering to do business in Vermont is the equivalent of consenting to general jurisdiction in Vermont's courts. But its example as a case denying Vermont personal jurisdiction over a foreign corporation registered to do business is further evidence that Vermont law

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at 576.

[13] Viko's attempt to distinguish Metropolitan Life on this basis is also surprising because the Burrington Court–upon which Viko principally relies–likewise makes no specific mention of the defendant's registered agent, noting only that it was registered to do business in Vermont. Burrington, 356 A.2d 506 (Vt. 1976).

requires more than mere compliance with its registration statute before a defendant may be haled into court.

Finally, a finding of general jurisdiction on a consent-based theory in this case would require the Court to adopt a unique conception of consent relative to all other legal contexts. In this case, there is no contract between Viko and World Vision to litigate in Vermont, no agreement to arbitrate, and no stipulation to jurisdiction by the Defendants. See, e.g., Ins. Corp. of Ireland, Ltd., 456 U.S. at 703-704 (providing a list of ways in which defendants may consent to jurisdiction which does not include registering to do business).[14] Instead, Viko claims consent based on compliance with a statute that says nothing on its face about either jurisdiction or consent, and in a state in which the limited case law on the issue, if anything, points in the opposite direction. Under these conditions it is impossible to see how World Vision

[14] The Eighth Circuit reasoned, without citation to authority, that consent via registration was "possibly omitted from the Supreme Court's list because it is of such long standing as to be taken for granted." Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir.1990). This seems improbable, however, unless one also assumes that providing consent via a contractual arrangement–which *is* listed–is somehow unobvious.

gave its express and considered "consent to be hauled into [Vermont] courts on any dispute with any party anywhere concerning any matter" when it submitted an application to transact business within Vermont. Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992); see generally Lee Scott Taylor, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163 (2003) (arguing that consent is an inadequate theory upon which to find general jurisdiction from compliance with registration statutes because the consequences of such compliance are unpredictable); Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 42-43 (1990) (arguing that "it is contradictory to infer from a statute an express consent to general jurisdiction when that statute does not explicitly mention the consequences that compliance will have on jurisdiction."). Even if the Court were so inclined, Vermont law does not permit such a tortured conception of consent to be applied in the context of personal jurisdiction. See First Nat'l Bank

of Boston v. Avtek, Inc., 360 A.2d 80, 85 (Vt. 1976) ("Consents to jurisdiction are narrowly construed, and will not be extended beyond their plain meaning and scope.").

For all of the foregoing reasons, I find that compliance with Vermont's foreign corporation registration statute does not entail consent to general personal jurisdiction, at least independently of the minimum contacts required by due process. However, since courts have considered this issue pursuant to similar statutes in a variety of jurisdictions, a few words are necessary to explain that such decisions do not compel a finding of consent in this case.

Rightly or wrongly, the continued notion that appointing a local agent to accept service amounts to jurisdictional consent is derived largely from the 1917 Supreme Court decision of Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917); see also Pierre Riou, *General Jurisdiction Over Foreign Corporations: All That Glitters Is Not Gold Issue Mining*, 14 REV. LITIG. 741, 748-752 (1995); Lea Brilmayer, et al., *A General Look At General*

Jurisdiction, 66 TEX. L. REV. 721, 755-760 (1988). In Gold Issue, the defendant Pennsylvania insurance company obtained a license to do business in Missouri and, as required, "filed with the superintendent of the insurance department a power of attorney consenting to that service of process upon the superintendent should be deemed personal service upon the company[.]" Id. at 94. After being sued in Missouri on a cause of action unrelated to its Missouri contacts, the defendant argued that service upon its agent was "insufficient except in suits upon Missouri contracts[.]" Id. The Missouri Supreme Court rejected this view, construing the relevant appointment statute to entail consent to accept service for all lawsuits. Id. at 95.

The Supreme Court subsequently affirmed and found no constitutional infirmities. Id. In a brief and rather cryptic opinion by Justice Holmes, the Court explained that the Missouri Supreme Court's statutory construction "did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert." Id. Holmes later distinguished between implied consent

inferred from the doing of business within a state, and actual consent provided by compliance with the state's appointment statute: "But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act."[15] Id. at 96.

Obviously, Gold Issue was decided prior to the landmark Supreme Court decision of International Shoe, which shifted the paradigm of personal jurisdiction away from a state's de facto "physical power" over a defendant, see McDonald v. Mabee, 243 U.S. 90, 91 (1917); Pennoyer v. Neff, 95 U.S. 714 (1877), towards compliance with "fair play and substantial justice," and the qualitative relationship between the defendant, the forum, and the litigation. International Shoe, 326 U.S. at 316-319; Shaffer v. Heitner, 433 U.S. 186, 204 (1977). As explained above, personal jurisdiction over a foreign defendant is now generally established by an assessment of the defendant's contacts with the forum

[15] Of course, the "interpretation" was that of the Missouri Supreme Court–the only question for Justice Holmes and the U.S. Supreme Court was whether that interpretation violated the Due Process Clause.

state, rather than whether the defendant is "present" within the state. See Shaffer, 433 U.S. at 212 ("all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.").

Nonetheless, some courts persist in following Gold Issue to find consent to general personal jurisdiction when a foreign corporation registers to do business. For example, the Delaware Supreme Court conducted a thorough examination of Gold Issue and the transition to International Shoe in Sternberg v. O'Neil, 550 A.2d 1105 (Del. 1988). In Sternberg, the court explained that "the holdings of the United States Supreme Court which involved foreign corporations, following International Shoe, are entirely consistent with the continued viability of its earlier holding in Pennsylvania Fire Ins. Co. [v. Gold Issue]." Id. at 1113. The court concluded that if "a foreign corporation has expressly consented to the jurisdiction of a state by registration, due process is satisfied and an examination of 'minimum contacts' to find implied consent is unnecessary." Id.; see also The

Rockefeller Univ. v. Ligand Pharm., 581 F. Supp. 2d 461, 467 (S.D.N.Y. 2008) (finding that the defendant's "unrevoked authorization to do business and its designation of a registered agent for service of process amount to consent to personal jurisdiction in New York."); Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990) ("We conclude that appointment of an agent for service of process . . . gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state. Such consent is a valid basis of personal jurisdiction, and resort to minimum-contacts or due-process analysis . . . is unnecessary."); Sondergard v. Miles, Inc., 985 F.2d 1389, 1397 (8th Cir. 1993) (citing Gold Issue, 243 U.S. at 96).

But other courts have refused to infer jurisdictional consent from compliance with registration statutes, arguing, inter alia, that it is inconsistent with the current "fundamental fairness" model of personal jurisdiction under International Shoe and its progeny. See, e.g., Freeman v. The Second

Judicial District Court, 1 P.3d 963 (Nev. 2000); Ratliff v. Cooper Labs., Inc., 444 F.2d 745, 748 (4th Cir. 1971) ("Applying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another . . . The principles of due process require a firmer foundation than mere compliance with state domestication statutes."); Consol. Dev. Co. v. Sherritt, Inc., 216 F.3d 1286, 1293 (11th Cir. 2000) ("Courts of appeals that have addressed this issue have rejected the argument that appointing a registered agent is sufficient to establish general personal jurisdiction over a corporation."); Sandstrom v. ChemLawn Corp., 904 F.2d 83, 89 (1st Cir. 1990) (mere license to do business and designation of agent for service of process within the forum state insufficient to confer general jurisdiction); Learjet Acquisition Corp., 966 F.2d at 183 ("In short, a foreign corporation that properly complies with the Texas registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible.").

In particular, reliance on Gold Issue and other

pre-International Shoe case law has come under scrutiny by courts and contemporary legal scholars. Some have contended that the "consent" found by Justice Holmes in Gold Issue was not really consent at all, but rather a functional proxy for the physical presence generally required to assert jurisdiction under the framework of Pennoyer v. Neff. See Kipp, *Inferring Express Consent*, 9 REV. LITIG. at 9; Freeman, 1 P.3d at 968. Under this view, the reasoning of Gold Issue was necessary to ensure that state residents had a means to pursue legal claims against the foreign corporations doing business in their state. Under the traditional rule that corporations legally existed only in the state of their incorporation, Bank of Augusta v. Earle, 38 U.S. 519, 588 (1839), state registration statutes created the legal fiction of "presence" within the forum that allowed foreign corporations to be served and brought to appear before local courts.[16] See In re DES Cases, 789 F. Supp. 552, 580 (E.D.N.Y. 1992). Since this

[16] The International Shoe Court itself gave credence to this view, observing that "some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. . .[b]ut more realistically it may be said that those authorized acts were of such a nature as to justify the fiction." International Shoe, 326 at 318-319 (internal citations omitted).

rationale no longer holds true under the current doctrine of minimum contacts and out-of-state service, some have argued that International Shoe was as deadly to Gold Issue as it was to Pennoyer, and that service upon a registered agent does not confer jurisdiction absent sufficient forum contacts. See, e.g., Freeman, 1 P.3d at 968; Shaffer, 433 U.S. at 227 (Brennan, J., dissenting) ("Once we have rejected the jurisdictional framework created in Pennoyer v. Neff, I see no reason to rest jurisdiction on a fictional outgrowth of that system such as the existence of a consent statute."); In re Mid-Atlantic Toyota Antitrust Litig., 525 F. Supp. 1265, 1278 n.10 (D.C. Md. 1981) ("consent statutes are largely obsolete and serve only to confuse matters in unusual cases. . .where a corporation's only contact with a state is its act of registering to do business there.").

Others have argued persuasively that the issue in Gold Issue was limited to consent to *service* only, and not to personal jurisdiction. See Pierre Riou, *General Jurisdiction Over Foreign Corporations: All That Glitters Is Not Gold Issue Mining*, 14 REV. LITIG. 741

(1995); see also Cognitronics Imaging Sys., Inc. v. Recognition Research Inc., 83 F. Supp. 2d 689, 692 n.1 (E.D. Va. 2000). This view is supported on numerous grounds. First, while Justice Holmes made no mention of the defendant's state contacts aside from its appointed agent, the lower court's finding of jurisdiction was based, in part, upon the premise that companies subject to suit on the basis of registration were also conducting business in the forum. Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co., 267 Mo. 524 (1916), aff'd 243 U.S. 93 (1917). Second, the Gold Issue opinion itself speaks only of effective service, saying, for example, "[t]he defendant had executed a power of attorney that made service upon the superintendent [of insurance] the equivalent of personal service." Gold Issue, 243 U.S. at 95. In contrast, there is no indication by Justice Holmes that the Missouri statute was jurisdictional, at least not beyond conferring jurisdiction that was already established by the defendant's business activities. Third, there is evidence that the prevailing practice during this era required a showing that a corporation

was actually doing business in the forum state, along with adequate service, to establish personal jurisdiction. United States v. American Bell Tele. Co., 29 F. 17, 34-35 (Circuit Court, S.D. Ohio 1886); Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 618 (1899). Accordingly, under this interpretation, Gold Issue allowed states to use registration statutes as a means to reach foreign corporations and enforce their jurisdiction, but it did not increase their jurisdiction to include registered foreign corporations that maintained no other business contacts in the forum.

This same interpretation can be given to Judge Cardozo's opinion in Bagdon v. Philadelphia & Reading Coal & Iron Co., 111 N.E. 1075 (N.Y. 1916), upon which Gold Issue heavily relies, and which is the foundational case for the general New York rule that Viko urges the Court to follow. Gold Issue, 243 U.S. at 95; The Rockefeller Univ., 581 F. Supp. at 466-467; (Doc. 22 at 3-4). Later courts finding consent via registration have pounced on Justice Cardozo's promulgation that "[t]he meaning must therefore be that

the appointment [of a registered agent] is for any action which under the laws of this state may be brought against a foreign corporation. . .[i]t means that, whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person." Bagdon, 111 N.E. at 1076. But they ignore the full context of this statement and Judge Cardozo's later qualification that "[i]t is true that even the president of a foreign corporation may be here without bringing the corporation itself within this jurisdiction . . . [b]ut when a corporation *is* engaged in business in New York, and is here represented by an officer, he is its agent to accept service, though the cause of action has no relation to the business here transacted." Id. at 1077. Thus Judge Cardozo apparently endorsed the rule that effective service is a necessary but not sufficient element of the jurisdictional equation, and must be combined with a showing that the defendant actually conducts business in the forum state. See Enger v. Midland Nat. Life Ins. Co., 222 N.W. 901, 903 (Minn. 1929) ("*So long as defendant is here doing business*, having appointed the

insurance commissioner . . . its lawful attorney in fact . . . we deem the service of this summons accordingly as effective to give jurisdiction over defendant as if served upon its principal agent[.]") (emphasis added) (citing Bagdon, 111 N.E. 1075); Tauza v. Susquehanna Coal Co., 115 N.E. 915, 917-918 (N.Y. 1917) ("Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents.").

Thus, there is substantial evidence to suggest that those jurisdictions holding onto the notion of registration as consent to general jurisdiction do so based on a complete misinterpretation of prior law. Further, to the extent that early cases such as Bagdon and Gold Issue hold that compliance with a registration requirement alone establishes personal jurisdiction –whether based on "consent," "presence," or some other theory–the viability of such holdings is cast in doubt by the Supreme Court's adoption of the "minimum contacts" approach to jurisdiction and due process in

International Shoe.[17] See also Perkins, 342 U.S. at 446.

To be sure, there exists a body of case law supporting Viko's argument that World Vision, Inc. has consented to be sued on all matters in Vermont. But the foundation supporting that law is too brittle and unsettled to compel the Court to follow it here, especially when so many jurisdictions disagree, and a plain reading of Vermont's registration statute, along with other relevant Vermont law and modern Supreme Court cases, point with relative clarity in the opposite direction.[18] Accordingly, I find that absent

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[17] Since Insurance Corp. of Ireland, 456 U.S. 694 (1982), there is little doubt that due process permits defendants to consent to jurisdiction. But it is a separate question whether due process will allow the inference of jurisdictional consent from compliance with a state registration statute, especially one, like Vermont's, from which the inference is less than obvious. On this precise point courts appear to be divided. See, e.g., In re DES Cases, 789 F. Supp. at 591-592 ("Although the Supreme Court has not directly pronounced on the subject . . . the constitutionality of the traditional practice of asserting general jurisdiction solely on the basis of a corporation's being licensed to do business in the forum seems to have survived International Shoe."); Learjet Acquisition Corp., 966 F.2d at 184 (commenting that it would violate due process to find jurisdiction over a defendant based solely on its registration to do business). Even if due process is satisfied with such jurisdiction, though, placing this condition on foreign corporations engaged in interstate commerce may exceed states' authority under the Dormant Commerce Clause. See, e.g., Davis v. Farmers' Co-op. Equity Co., 262 U.S. 312 (1923); Pensacola Tel. Co. v. Eastern Union Tel. Co., 96 U.S. 1 (1877).

[18] Notably, not even the law of New York is universally in Viko's favor. See, e.g., Bellepointe, Inc. v. Kohl's Dept. Stores, Inc., 975 F. Supp. 562, 564 (S.D.N.Y. 1997) (declining to follow the proposition that possession of a license to do business is sufficient to assert jurisdiction to "adhere instead to the rule . . . that a license to do business is not dispositive on the issue of personal jurisdiction.")

the requisite "minimum contacts" with the state of Vermont, service upon a defendant foreign corporation's registered agent does not, by itself, confer general personal jurisdiction over the defendant. Whether such contacts exist in this case is the matter to which I now turn.

b. Are World Vision, Inc.'s Vermont Contacts Sufficient to Satisfy Due Process?

Viko alleges that WV, Inc. maintains contacts with Vermont that are continuous and "so substantial and of such nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." These contacts include (1) WV, Inc.'s registration to do business in Vermont and the appointment of an agent to receive service of process, (2) a World Vision radio program, "World Vision Report," that is regularly broadcast via local radio stations in seven Vermont localities, and (3) WV, Inc.'s website, which allows users, including Vermonters, to make online donations. (Doc. 9 at 7-8; Doc. 9-3 at 28.) Viko also contends, though without

(internal citation omitted).

any discernable bases, that World Vision "receives substantial benefits from marketing and fundraising conducted in Vermont[.]" (Doc. 9 at 8).

Though the relevance of each of these contacts may be analyzed individually, they ultimately must be considered together, in sum, to evaluate the extent of WV, Inc.'s Vermont contacts. Metropolitan Life, 84 F.3d at 571.

The most complex issue presented is the degree, if any, to which WV, Inc.'s website should be considered a continuous and substantial contact with the state of Vermont. As many courts have already recognized, the internet presents a new test for the traditional minimum contacts standards promulgated by the Supreme Court in International Shoe and its progeny. A website hosted at one location can be accessed not only in every state of the U.S., but all over the world. And perhaps most importantly in the context of personal jurisdiction, "[u]nlike newspaper, mailing, radio, television, and other media containing advertisements and solicitations, most Internet advertisements and solicitations are not directed at . . . specific

geographic areas or markets; to the contrary, advertising on the Internet targets no one in particular and everyone in particular in any given geographic location." Millennium Enter., Inc. v. Millennium Music LP, 33 F. Supp. 2d 907, 914 (D. Or. 1999).

The seminal case on the internet and jurisdiction is likely Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), in which the court described its "sliding scale" test for individual websites. In designing its "sliding scale" the court tried to balance the reality that the Internet allows companies to maintain substantial commercial contacts in many fora without any actual physical presence, with the concern that jurisdiction predicated on websites could "turn the notion of federal personal jurisdiction on its head, eliminating the protections that jurisdictional requirements were designed to safeguard." Bell v. Imperial Palace Hotel/Casino, 200 F. Supp. 2d 1082, 1091 (E.D. Mo. 2001); Cf. Hanson v. Denckla, 357 U.S. 235, 251 (1958).

The Zippo court found that, "the likelihood that

personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." Id. at 1124. The court then described its scale, on one end of which are "passive" websites which merely post information that can be accessed by users in a foreign jurisdiction. On the other end are "active" sites through which "a defendant clearly does business over the Internet," such as by entering "contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet." Id. In the former instance personal jurisdiction will not lie, but in the latter a defendant's business contacts via online interactions may bring its person within the jurisdiction of a foreign forum. The court also described an intermediate area on the scale for websites that are "interactive," meaning a user can exchange information with the host computer, but is not able to enter contracts or engage in other commercial activity online. In these cases, "the exercise of jurisdiction is determined by examining the level of

interactivity and commercial nature of the exchange of information that occurs on the Website." Id.; see also On-Line Tech. v. Perkin Elmer Corp., 141 F. Supp. 2d 246, 265 (D. Conn. 2001).

While the Zippo test has been used repeatedly in many jurisdictions, and both parties urge it upon the Court, there are two impediments to its application here.[19] First, Zippo concerned only *specific* personal jurisdiction, not general, so its reasoning is not perfectly analogous to the present case.[20] Second, many courts have recognized that the "test" is not really a test at all, at least not in the sense that it represents a formal legal standard. Instead, the sliding scale is merely an analytical framework through which judicial evaluations about online activity can be

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[19] Viko's assertion that "[t]his Court has adopted the factors set out in Zippo . . . in order to determine whether maintenance of an interactive website supports a finding of general jurisdiction in this district" is not accurate. First, the case cited by Viko, Hyperkinetics Corp. v. Flotec, Inc., 2003 WL 25278086 (D. Vt. September 25, 2003) concerned a claim that the defendant's website gave rise to specific jurisdiction. Id. at *5. Second, while the Court discussed Zippo, it did not formally adopt it. Id. World Vision also claims Zippo applies to this case. (Paper 16 at 4).

[20] A number of courts faced with a general jurisdiction inquiry have relied on Zippo, though the analysis is generally modified to ensure that sufficient forum contacts are present. See, e.g., Mink v. AAAA Development, LLC, 190 F.3d 333, 335-336 (5th Cir. 1999); Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 513 (D.C. Cir. 2002); Soma Medical Int'l v. Standard Chartered Bank, 196 F.3d 1292 (10th Cir. 1999).

made. See, e.g., Lakin v. Prudential Sec., Inc., 348 F.3d 704, 711 (8th Cir. 2003).

As the Zippo court itself noted, the sliding scale only goes to the "likelihood," or *potential*, that a particular website has for maintaining continuous and substantial contacts in a foreign jurisdiction. "The analysis cannot begin and end with the 'active' and 'passive' labels . . . [t]he fact that a site is classified as 'interactive' is irrelevant to the analysis of general jurisdiction if no one from the forum state has ever used the site." Bell v. Imperial Palace Hotel/Casino, 200 F. Supp. 2d at 1091-1092. Accordingly, "While . . . the Zippo sliding scale of interactivity may help frame the jurisdictional inquiry in some cases . . . it does not amount to a separate framework for analyzing internet-based jurisdiction," and the traditional notions of minimum contacts and due process–that is, whether the defendant deliberately maintains substantial and continuous contacts in a particular forum–still govern the inquiry. Best Van Lines, Inc. v. Walker, 490 F.3d 239, 252 (2d Cir. 2007) (internal quotation marks omitted); see also Hy Cite Corp. v. Badbusinessbureau.com, LLC, 297 F. Supp. 2d

1154, 1160 (W.D. Wis. 2004) ("regardless of how interactive a website is, it cannot form the basis for personal jurisdiction unless . . . the contacts through the website are so substantial that they may be considered 'systematic and continuous'"); Coastal Video Communications Corp. v. Staywell Corp., 59 F. Supp. 2d 562 (E.D. Va. 1999).

This focus on the actual contacts made through a website, as opposed to the mere nature of the website itself, is particularly important in the context of *general* personal jurisdiction. Indeed, there is a "consensus among the courts . . . that general jurisdiction cannot be founded solely on the existence of a defendant's internet website." Degesse v. Plant Hotel N.V., 113 F. Supp. 2d 211, 221 (D. N.H. 2000); see also WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL: 3d § 1073.1 (2002) ("The mere maintenance of a website in one state, by itself, apparently will not be sufficient to subject a defendant to the general in personam jurisdiction of a federal court in another state.").

Accordingly, in order to demonstrate jurisdiction a plaintiff cannot merely show the existence of a

website–even one that is "active" or "interactive"–but must show actual substantial and continuous contact through the website with the forum state. ESAB Group, Inc. v. Centricut, LLC, 34 F. Supp. 2d 323, 330-331 (D. S.C. 1999) ("the critical issue for the court to analyze is the nature and quality of commercial activity actually conducted by an entity over the Internet in the forum state."). That a website creates the mere potential for forum contact, or renders contact foreseeable, will not be sufficient to establish a substantial presence within the forum. See Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) aff'd 126 F.3d 25 (2d Cir. 1997).

In this case, WV, Inc.'s website promotes World Vision and permits internet users to make donations via online transactions and sign up for email updates from World Vision. (Doc. 9 at 7-8; Doc. 9-3 at 28). It also allows users to order, free of charge, World Vision display materials for individual use. Id. Despite conceding that the site "provides a portal for making donations," World Vision makes the odd claim that it "is nothing more than a passive site that makes information available about the World Vision

partnership[.]" (Doc. 16 at 5). That dog, quite obviously, will not hunt. But as discussed, the extent to which WV, Inc.'s website has the functional capacity for commercial interactivity is of little relevance absent actual and continuous contacts with Vermont.

Consistent with this legal approach, other courts have declined to assert personal jurisdiction when the defendant's contacts consist of an interactive website in addition to other minimal forum contacts. For example, in Degesse v. Plant Hotel N.V., 113 F. Supp. 2d 211 (D. N.H. 2000), the district court found that it did not have general personal jurisdiction over a foreign hotel company, even though the defendant broadcast television advertisements in the forum and maintained a website through which forum residents could make reservations. The court said that, "[e]ven assuming that the advertisements were aired on local television, and even taken together with [the defendant's website], such activities do not constitute continuous and systematic contacts and therefore cannot support an assertion of general jurisdiction." Id. at 219. Moreover, the court added that because the plaintiffs offered no evidence that the defendant

"actually and deliberately used its website to conduct commercial transactions or other activities with residents of the forum . . . the website adds *no support* to their claim of general jurisdiction." Id. at 223-224 (emphasis added).

In Hy Cite Corporation, 297 F. Supp. 2d 1154 (W.D. Wis. 2004) a district court in Wisconsin considered personal jurisdiction based on a website similar to that of WV, Inc. In Hy Cite, the defendant, a company designed to aid disgruntled consumers, operated a website that solicited donations and allowed users to volunteer as "rip-off reporters." Id. at 1161. In addition to its website the defendant sold one book to, and had communications with, Wisconsin residents. Id. The court found that "plaintiff's argument that general jurisdiction exists in this case borders on the frivolous . . . With the exception of the book sale to one Wisconsin resident and the communication between the parties, all of the activities identified by the plaintiff consist of nothing more than *potential* contacts." Id.

Here, Viko has alleged nothing more than potential contacts with Vermont via WV, Inc.'s website. Despite

Viko's assertion that WV, Inc.'s website is "directed to Vermont residents," and "although [he] characterizes defendant's internet-based activities as 'soliciting' [Vermont] business, [he] has not alleged that defendant has done anything to target internet users in [Vermont]."[21] (Doc. 9 at 7; Doc. 22 at 8); Hy Cite, 297 F. Supp. 2d at 1161. Accordingly, although WV, Inc.'s website may be a "continuous" contact in the sense that it is available to Vermonters 24 hours of every day, it is not "substantial" and is therefore not a significant contact for purposes of asserting general personal jurisdiction.

"World Vision Report" is also broadcast regularly throughout Vermont but, far from "peppering the airwaves" as Viko describes, the broadcast occurs only on weekends and generally in the early morning hours. (Doc. 9 at 8, Doc. 16 at 3.) This contact is continuous in that it airs every week, but it is hardly substantial. Moreover, there are no allegations that the broadcast is in any way commercial in nature, or

[21] Viko initially argued that the "drop down" menus on WV, Inc.'s website which allowed for the selection of "Vermont" (as well as every other state) was evidence that the defendant targeted Vermonters. (Doc. 9 at 7-8). But he has since conceded that this fact would only be relevant in a case of specific jurisdiction. (Doc. 22 at 8 n.6).

even that it describes or discusses World Vision projects. According to the evidence submitted by Viko, it is simply a news broadcast, designed to "capture[] the human drama behind global issues and events affecting the world's poorest children and families." (Doc. 9 at 8). This evidence distinguishes this case from those cited by Viko in which sustained local advertising supported a finding of jurisdiction. (Doc. 22 at 5).

And while the broadcast is apparently made via local affiliate stations, there is no evidence that the show specifically targets Vermonters. To the contrary, counsel for World Vision represented that "the radio broadcasts at issue are nationwide in scope" (Doc. 24 at 7), an assertion uncontradicted by Viko.

Finally, we return to the issue of WV, Inc.'s registered agent, analyzing it not as consent, but as one WV, Inc.'s "contacts" with the state of Vermont. In this regard, and as recognized by this Circuit, I am persuaded that a registered agent and a concomitant authorization to do business are of minor significance. Much like the creation of a website, the mere authorization to do business is only a *potential*

contact, and is clearly distinct from actually engaging in continuous and substantial commercial activity. See Metropolitan Life, 84 F.3d at 570 (citing Sandstrom v. ChemLawn Corp., 904 F.2d 83, 89 (1st Cir 1990), for the proposition that a "mere license to do business...within [the] forum state [is] insufficient to confer general jurisdiction"); Ratliff, 444 F.2d at 748 ("Applying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another . . . The principles of due process require a firmer foundation than mere compliance with state domestication statutes."); Contra Junction Bit & Tool Co. v. Institutional Mortgage Co., 240 So.2d 879, 882 (Fla. App. 1970) (finding that minimum contacts are "patently established" where a foreign corporation has qualified to do business in the forum state).

In sum, WV, Inc. has neither an office, a bank account, nor employees in Vermont. It is not organized under Vermont's laws, its principal place of business is elsewhere, and no supervisory decisions are made in Vermont. Even considering the contacts alleged by Viko together, as the courts did in Hy Cite and Degesse, there are really no deliberate and continuous contacts

with Vermont aside from a nationally syndicated radio program that airs on weekends, sometimes at four in the morning. (Doc. 16 at 3). WV, Inc. does maintain an interactive website, but since it does not in any way target Vermont residents specifically, it is no more present here than in any other forum. Given the ever rising frequency with which even small businesses maintain interactive websites, giving significant weight to this contact would essentially eviscerate traditional principles of federalism and jurisdiction divided among the several states.

Drawing all inferences in favor of Viko, these contacts may rise above those rejected as insufficient by the Supreme Court in Helicopteros, since Helicopteros involved "mere purchases," and here there is some level of solicitation. Helicopteros, 466 U.S. at 411. But they are less significant than those present in other "close cases" from this district, including Sollinger v. Nasco, 655 F. Supp. at 1388-1389 (finding general jurisdiction over defendant who targeted individual Vermont residents with direct mailings), and Metropolitan Life, 84 F.3d at 572-573 (finding minimum contacts in a "close case" where the

defendant had $4 million in sales to Vermont, registered to do business in Vermont, maintained relationships with dealers and "authorized" builders in Vermont, provided advertising and support to Vermont residents, and deliberately targeted Vermont firms as sales prospects).

Accordingly, I find that WV, Inc. lacks the continuous and substantial contacts with the state of Vermont that would allow it to be sued here on a cause of action arising out of an automobile accident in Mozambique. It is true that at this early stage of the litigation Viko need only make out a prima facie case of jurisdiction, but that means he "must plead facts which, if true, are sufficient in themselves to establish jurisdiction." Bellepointe, Inc., 975 F. Supp. at 564 -565; Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 184 (2d Cir. 1998). This Viko has not done. While he has shown that WV, Inc. is not completely absent from Vermont, the "more stringent" assessment of state contacts required for general jurisdiction implies that one can have *some* contact with a forum–even more than negligible contact–before being subject to the forum's courts on any matter

arising any where.

Additionally, the Court finds it would likewise violate due process to assert personal jurisdiction over World Vision International, since even Viko concedes it has no Vermont contacts independent of those maintained by WV, Inc.

Finally, without the Vermont contacts required by due process, there is no need to determine separately whether the exercise of general jurisdiction would be reasonable in this case. See Bechard, 810 F. Supp. at 585; Helicopteros, 466 U.S. at 418-419 (relying solely on lack of minimum contacts to reverse lower court's assertion of personal jurisdiction).

II. Jurisdictional Discovery is Not Warranted

I also find that limited discovery on the jurisdictional issue would not be productive in this case. First, while Viko expressed his obvious preference for discovery over dismissal in his Response to World Vision's Motion to Dismiss and at oral argument, he has not technically moved for leave to take jurisdictional discovery. As a result, this issue has not been the subject of any pleadings before the

Court, and legal argument as to whether Viko is entitled to discovery and, if he is, to what extent discovery should be permitted, is virtually nonexistent.[22]

There is no precise standard in the Second Circuit to determine when a plaintiff is entitled to discovery on the issue of personal jurisdiction. In Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 186 (2d Cir. 1998), the court found that a district court did not err in denying discovery because the plaintiffs "did not establish a prima facie case that the district court had jurisdiction over" the defendant. However, the Circuit has since suggested that district courts may be obligated to order jurisdictional discovery based on a lesser showing, in particular when the plaintiff fails to allege legally sufficient facts to establish jurisdiction, but nonetheless asserts specific, non-conclusory facts that, if further developed, could demonstrate substantial state contacts. See Texas Intern. Magnetics, Inc. v. BASF

[22] In his Response in Opposition to World Vision's Motion to Dismiss, Viko noted only that, "In deciding a pretrial motion to dismiss for lack of personal jurisdiction a district court has considerable procedural leeway," and "it may permit discovery in aid of the motion." (Doc. 9 at 12).

Aktiengesellschaft, 31 Fed. Appx. 738, 739 (2d Cir. 2002) (Not Reported). Other Circuits have said that jurisdictional discovery is not appropriate unless "the plaintiff [has] at least a good faith belief that such discovery will enable it to show that the court has personal jurisdiction over the defendant." FC Inv. Group LC v. IFX Markets, Ltd., 529 F.3d 1087, 1092 (D.C. Cir. 2008).

Aside from Viko's conclusory assertion that WV, Inc. derives "substantial benefits from marketing and fundraising conducted in Vermont" (Doc. 9 at 8), he does allege specific facts upon which his theory of jurisdiction is based. But even if these facts require a more forgiving standard, Viko has not alleged facts that, if further developed with greater detail, could in any realistic likelihood justify the assertion of general personal jurisdiction over WV, Inc.

In other words, with the Vermont contacts alleged at this point, Viko has not made the "sufficient start" towards establishing jurisdiction that warrants the further costs and delay of jurisdictional discovery. Uebler v. Boss Media AB, 363 F. Supp. 2d 499 (E.D.N.Y. 2005) (internal citation omitted); Kiobel v. Royal

Dutch Petroleum Co., 2008 WL 591869, *10 (S.D.N.Y. 2008) (Not Reported). All that could be learned from a further investigation of these facts is that WV, Inc.'s website serves as an actual contact with this state because Vermonters use the site to make donations or sponsor children in need overseas. But with only a nationally syndicated news program and a registered agent as additional contacts with Vermont, the quality and quantity of such online transactions would have to be particularly substantial to support personal jurisdiction for a completely unrelated cause of action. This Court and this Circuit have found mere sales–the for-profit analog of receiving donations–to be an insufficient basis for general jurisdiction. See, e.g., Metropolitan Life, 84 F.3d at 577-588 (noting that the defendant's "$4 million dollars in sales in Vermont . . . standing alone, may not have been sufficient" to find general jurisdiction); Dearwater v. Bond Manufacturing Co., 2007 WL 2745321, at *7 (D. Vt. Sept. 19, 2007) (rejecting an assertion of general jurisdiction, in part, because the defendant "does not have significant contacts with Vermont apart from its sales."); see also Hy Cite, 952 F. Supp. at

1161 (explaining that in order for a website to justify general jurisdiction it must specifically target residents of the forum, as opposed to rendering the defendant generally accessible regardless of location).

In short, Viko clearly has not made a prima facie showing of jurisdiction, nor has he provided any basis for the good faith belief that further discovery will establish the contacts required before this Court may exercise general jurisdiction over a foreign defendant.[23]

III. Forum Non Conveniens

In addition to lack of personal jurisdiction, both WV Int'l and WV, Inc. move to dismiss based on the common law doctrine of *forum non conveniens*. (Doc. 5 at 9). *Forum non conveniens* allows a federal court to dismiss an action even when the court has proper venue when "the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere

[23] To be sure, Viko could also conduct discovery on the relationship between World Vision, Inc. and World Vision International. But that would only be relevant after finding that WV, Inc. is subject to jurisdiction in this Court in the first place.

else." Grammenos v. Lemos, 457 F.2d 1067, 1074 n.5 (2d Cir. 1972). However, since the enactment of 28 U.S.C. § 1404(a), "the federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad." American Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994); Capital Currency Exch. v. Nat'l Westminster Bank, 155 F.3d 603, 607 (2d Cir. 1998).[24] Here, the defendants argue that Mozambique provides a suitable alternative forum. (Doc. 5 at 9).

In this case, reliance on *forum non conveniens* is not appropriate since the Court lacks personal jurisdiction over the defendant and venue is therefore improper. 28 U.S.C. § 1391; Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506 (1947). By finding no personal jurisdiction over World Vision, the options in this case are already reduced to either dismissing the case or transferring it to another district court, and a consideration of *non conveniens* would neither expand those options nor influence the choice between them.

[24] Some courts have held that in rare circumstances dismissal under *forum non conveniens* is appropriate when the alternate forum is a state court. See, e.g., Brice v. C.R. England, Inc., 278 F. Supp. 2d 487 (E.D.Pa. 2003). In this case, the defendants have not offered an alternate state forum, therefore this possibility is not present here.

See 14 U.S.C. § 1406(a).

In any event, the Court notes that *forum non conveniens* could not be an appropriate vehicle for dismissal in this case because World Vision has not met its burden of establishing that a presently available and adequate alternative forum exists. Abdullahi v. Pfizer, Inc., 2009 WL 214649, *19 (2d Cir. 2009); Gross v. British Broad. Corp., 386 F.3d 224, 230 (2d Cir. 2004) (citing Iragorri v. United Techs. Corp., 274 F.3d 65 (2d Cir. 2001) (en banc)). Quite to the contrary, Viko has offered evidence, as it was his initial burden to do, that the Mozambican judicial system is plagued by corruption, and that "enforcement of contracts and legal redress cannot be assured" through Mozambican courts. (Doc. 9-3 at 56-57). Further, World Vision is quite candid in its ignorance of Mozambique law and what legal standards, "if any," would apply in this case. (Doc. 5 at 10).

Under Second Circuit law, a forum may be inadequate "if it does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is

tantamount to no remedy at all." Abdullahi, 2009 WL 214649 at *19. Based on the uncontradicted evidence submitted by Viko, the proposed alternative forum of Mozambique is clearly inadequate under this standard.

IV. Transfer of Venue

Without personal jurisdiction over either of the defendants, this lawsuit cannot proceed in Vermont. However, rather than dismissing the case, the Court is statutorily authorized to transfer this matter to "any district or division in which it could have been brought" if "it be in the interest of justice" to do so. 28 U.S.C. § 1406(a); American Wholesalers Underwriting, Ltd. v. American Wholesale Ins. Group, Inc., 312 F. Supp. 2d 247, 259 (D. Conn. 2004); Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962).

This case clearly could have been brought in the Central District of California where both defendants are headquartered[25] and are thus amenable to judgment. (Doc. 5 at 9). And since Viko is a resident of

[25] The Court notes that World Vision, Inc.'s principal place of business is apparently in Federal Way, WA. (Doc. 5-2 at 8). However, in its Motion to Dismiss World Vision represented to the Court that the Central District of California is "the location of both entities' headquarters[.]" (Doc. 5 at 9). In either case, WV, Inc. is organized under California law.

Vermont, diversity would be complete in California as well.

Further, the Court finds that it is in the interest of justice to transfer rather than dismiss this case. Viko was not unreasonable to seek venue in Vermont, and he did not do so out of bad faith. Instead, he pursued this matter here because he is a Vermont resident seeking redress for his injuries in the most convenient forum possible. Moreover, World Vision will not be prejudiced since its notice of this litigation is clearly evidenced by its appearance to contest venue and jurisdiction. American Wholesalers Underwriting, 312 F. Supp. at 259-260.

Accordingly, I recommend that this case be transferred to the Central District of California pursuant to 28 U.S.C. § 1406(a).

Conclusion

This case belongs in California. The Court is not unsympathetic to Paul Viko's current situation as a Vermont resident in his seventies who suffered very serious physical injuries. But these injuries occurred in Mozambique, where Viko went voluntarily and without any reasonable expectation that whatever calamity may

befall him could be remedied in the state of Vermont–legally, medically, or otherwise. And, in my view, this particular case cannot be pursued in Vermont without violating the constitutional rights of both of the named defendants.

Viko's counsel has admirably advanced every conceivable theory and argument on his behalf, but ultimately Viko simply cannot allege the Vermont contacts necessary to satisfy due process. And even with sufficient contacts assumed, he must still show that World Vision International should share whatever "consent" or "contact" is attributable to World Vision, Inc. Obviously, I do not reach the merits of Viko's argument on that point in this recommendation.

If this is a close case at all, it is only as to whether an order for jurisdictional discovery would be appropriate. Here, there is no reasonable expectation that discovery would be fruitful, and thus there is no reason to waste further time and resources when the case could proceed immediately in California.

Accordingly, I recommend that the Defendants' Motion to Dismiss (Doc. 5) be DENIED, but that their Motion to Transfer (Doc. 26) be GRANTED, and that this

matter be TRANSFERRED to the Central District of California pursuant to 28 U.S.C. § 1406(a).

Dated at Burlington, in the District of Vermont, this 27th day of April, 2009.

/s/ John M. Conroy
John M. Conroy
United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appeal the District Court's order. See Local Rules 72.1, 72.3, 73.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b), 6(a) and 6(e).